Citizens Publishing and Printing Company *and* Teamsters Local Union No. 261 a/w International Brotherhood of Teamsters, AFL–CIO. Cases 6–CA–27215, 6–CA–28147–1, 6–CA–28147–2, 6–CA–27832, and 6–CA–27832–2

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 30, 1997, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[2]

Contrary to our dissenting colleague, we agree with the judge for the reasons he stated that the Respondent violated Section 8(a)(5) of the Act by unilaterally subcontracting the night and weekend (n/w) work of the full-time photographer to stringers. The record reflects that Eugene "Bud" Dimeo was the full-time photographer at the *Ellwood City Ledger* for 35 years until his retirement in January 1995. Dimeo took photos for the newspaper and worked in the dark room developing pictures on weekdays. N/W photography assignments were given to "stringers," i.e., freelancers on whom the Respondent could rely to cover assigned events. Stringers were paid $5–6 a photo, with no deductions taken from their checks. Sports editor, Mark Crepp, also took n/w photos in his spare time to earn extra income. He, too, was paid a flat per photo fee, but the money was included in his regular paycheck and payroll deductions were made based on the gross amount of his check.

In 1993, the volume of work for Dimeo to perform diminished. When Jim Tammaro, a stringer, quit in August 1993, n/w work was assigned to Dimeo, and he, along with Crepp, took most of the n/w photos.[3]

During negotiations for a collective-bargaining agreement in 1994, the Respondent's use of stringers was discussed but not resolved. On June 3, 1994, the Respondent and the Union agreed that the Respondent would continue the past practice during negotiations. Significantly, a day later, the Union requested that the Respondent employ a stringer to take n/w photos to enable Dimeo to spend more time with his ailing wife, but the Respondent refused.

When Dimeo retired in January 1995 the Respondent assigned Crepp to be the full-time photographer. Crepp also alternated as a weekend sports editor, wrote sports stories, and did sports layout, as well as working on the "Progress Edition," an annual business supplement due out in April. In March 1995 Crepp expressed concern about completing the n/w photography work that Dimeo previously had done. To resolve the situation, the Respondent's general manager, Scott Kegel, retained a stringer, Jackson, to perform the n/w work. Jackson quit, and Kegel retained two stringers to replace him. With the hiring of two stringers, Crepp worried that he had permanently lost the n/w work that he wanted to supplement his income. He complained to the Union, and the Union subsequently filed the unilateral subcontracting charges at issue in this case and called a strike.

The record establishes, and the judge found, that the Respondent made n/w work part of the regular duties of the full-time photographer position in August 1993 when it assigned such work to Dimeo. N/W work effectively became bargaining unit work at that time. Therefore, we agree with the judge that when the Respondent hired new stringers to perform the n/w work of the full-time pho-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] On June 1, 1999, counsel for the General Counsel filed an unopposed motion to sever and remand Cases 6–CA–27832 and 6–CA–27832–2, which involve the Respondent's prosecution of libel actions in state court. Thereafter, on June 29, 1999, the General Counsel filed a motion, which also was not opposed, to withdraw certain exceptions, sever the foregoing cases, and dismiss portions of the consolidated complaint. The motions are based on the parties' non-Board settlement of the state court libel actions. The Board granted the motions and dismissed the complaint allegations in Cases 6–CA–27832 and 6–CA–27832–2 on July 14, 1999.

As a part of the non-Board settlement mentioned above, the Union disclaimed "any and all interest" in representing the employees, effective December 28, 1998. Accordingly, although we agree with the judge's finding that the Respondent unilaterally subcontracted unit work in contravention of Sec. 8(a)(5) and (1), in the absence of a request for alternate remedial action, we have modified the judge's order to delete the requirement that the Respondent bargain with the Union over the subcontracting. *Rochester Institute of Technology*, 264 NLRB 1020, 1021 fn. 7 (1982). Cf. *Wells Fargo Armored Service Corp.*, 290 NLRB 936 (1988).

We find merit in General Counsel's exception that the judge should have ordered that the backpay for the effectively discharged strikers be awarded from the date of their discharge, March 14, 1996, rather than from the date of the Union's unconditional offer on their behalf to return to work in May. See *American Linen Supply Co.*, 297 NLRB 137 (1989), enfd. 945 F.2d 1428 (8th Cir. 1991); *Granite Construction Co.*, 330 NLRB 205 (1999).

[3] As the full-time photographer, Dimeo was not paid extra for his n/w work. The record shows that the Respondent used four stringers to take photos for the *Ledger* and its other local newspaper, the *Valley Tribune*, between August 1993 and January 1995. Harry Bazzichi occasionally took n/w photos but quit in November 1994, and Jan Marshall, a fire fighter, took fire photos. Gwennie Sloan took photos from April 1994 to March 1995, and Kitty McGraw who worked primarily for the *Valley Tribune* also took some stringer photos. However, Dimeo and Crepp did the bulk of the n/w photography work during this period.

tographer in 1995, without first consulting the Union, it unilaterally subcontracted unit work in violation of Section 8(a)(5).[4] That the Union's initial concern was the reduction of extra income opportunities that Crepp had come to expect does not diminish the fact that n/w work that had become part of the photographer's job was given to stringers Jackson, Robinson, and Manzo.[5] Nor does the fact that Crepp was overextended excuse the Respondent's unilaterally subcontracting the n/w duties of the full-time photographer. The determinative factor is not that the Respondent had a longstanding practice of using stringers, as our dissenting colleague concludes, or that it may have been reasonable to assign n/w work to stringers because Crepp was wearing several hats; it is that the Respondent subcontracted to stringers the n/w work of the full-time photographer without notifying and bargaining with the Union. This is particularly significant in light of its refusal to do so in 1994 when the Union requested that the Respondent hire a stringer to relieve Dimeo of n/w work.

Further, we agree with the judge that the July 24 strike by employees was initiated in response to the Respondent's unilateral subcontracting of the n/w work. Both Crepp and Local Union President Douglas Campbell testified that the employees voted to strike after being informed that the Board's Regional Office would issue a complaint on the Union's subcontracting charges. Thus, contrary to our dissenting colleague's view, the strike clearly was an unfair labor practice strike from its inception. Consequently, the Respondent was not free on March 14, 1996, to convey to the Union that striker replacements would become permanent, or to refuse to immediately reinstate strikers following their unconditional offer to return to work. By doing so, the Respondent violated Section 8(a)(3) and (1) of the Act. *Dorsey Trailers, Inc.,* 327 NLRB 835 (1999).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and directs that the Respondent, Citizens Publishing and Printing Company, Ellwood City and Beaver Fall, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth below.

1. Cease and desist from

(a) Unilaterally subcontracting night and weekend photography work performed by the regular, full-time photographer.

(b) Unlawfully discharging strikers and failing to reinstate them.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days, restore the status quo with respect to the night and weekend photo work performed by the regular, full-time photographer prior to April 15, 1995.

(b) Within 14 days from the date of this Order, offer Susan Bertagna, Stacey Book, Barbara Bellisimo, Joyce Bender, Jean Bischoff, May Ann Caputo, Anthony Carrozza, Mark Crepp, Charlene Donley, Harry Elder, Colleen Flecher, Bridget Hysell, Michelle Lamanza, Kim McCarten, Carol McDonald, Blanche Novak, Jill Paschl, Brian Rooney, Raney Senior, Donald Shellenberger, Steve Shinsky, Susan Smith, George Veres, JoEllen Whitlatch, Richard Winchell, and Janet Young full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the employees named in paragraph 2(b), above, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, beginning on March 14, 1996.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Ellwood City and Beaver Falls, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 1995.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsi-

[4] *Acme Die Casting,* 315 NLRB 202 (1994).

[5] In this connection, we agree with the judge that there is no evidence that Crepp personally suffered a loss because of the subcontracting of n/w work. Indeed, Crepp testified that he earned more in overtime during this period than by taking n/w photos.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ble official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that, the complaint is dismissed insofar as it alleges violations of the Act no specifically found.

MEMBER HURTGEN, dissenting.

I disagree with my colleagues' adoption of the judge's conclusion that the Respondent violated Section 8(a)(5) by unilaterally subcontracting certain night and weekend photography work.[1] The issue for resolution is whether the Respondent changed its past practice regarding its use of photographic "stringers" to perform the night and weekend photography work.[2] Contrary to my colleagues, I find that the Respondent did not violate the Act because its use of "stringers" was consistent with its established past practice.

As fully set forth by the judge, the Respondent employed full-time photographer Bud Dimeo for over 35 years. Dimeo performed regular daytime photography work. Also, over the years, the Respondent had used several stringers to cover the night and weekend photography work, sometimes hiring three to four at a time. At some point in 1993, daytime photography work began to decline for Dimeo. To keep Dimeo busy and also to permit sports editor Mark Crepp to earn extra money, the Respondent assigned night and weekend photography work to the two of them.[3] Dimeo performed this work as an employee; Crepp performed as a stringer—independent contractor.

During contract negotiations, the parties discussed the Respondent's use of stringers but failed to resolve the matter. Dimeo retired in January 1995, and Crepp became the full-time photographer. Ultimately, however, Crepp was too busy with his other responsibilities to be able to complete the photography work. In response to this, the Respondent hired a stringer who quit a few days later. The Respondent then hired two more stringers. The Respondent informed Crepp that the two stringers would perform most of the photography work but that Crepp would continue to take sports photographs on nights and weekends.

Based on the above, I cannot find that the Respondent made an unlawful unilateral change in 1995. The judge essentially reasoned that, in 1993, most of the night and weekend photographic work became the work of the full-time photographer Dimeo (i.e., bargaining unit work), and thus the Respondent acted unlawfully in 1995 by unilaterally removing this work from the bargaining unit and giving it to stringers.

Unlike the judge, I do not find that the Respondent's "past practice" was such that night and weekend photography work became the unit work of the full-time photographer. For many years, the Respondent had made considerable use of stringers to perform night and weekend photographic work. In 1993, to keep Dimeo from having idle time, the Respondent assigned Dimeo some of this work. Also, in 1993, Crepp helped Dimeo with the night and weekend work. As the judge specifically found, Crepp performed his photography work as a stringer. Further, as the judge found, after 1993, other stringers (including Harry Bazzichi, Jan Marshall, Gwenn Sloan, and Kitty McGraw) performed occasional stringer work. Thus, both before and after 1993, and both before and after the advent of the Union, the Respondent, when necessary to meet its photographic needs, made considerable use of stringers for night and weekend work. Thus, in my view, looking at the Respondent's long history of using stringers, I conclude that it had a longstanding "past practice" of using stringers for night and weekend photographic work as its needs warranted. The events of 1993 did not alter the Respondent's past practice. Rather, in order to keep Dimeo busy in 1993, it gave him some night and weekend work. However, it did not change but rather continued its existing practice of also using stringers for this work (e.g., Crepp). When Crepp in 1995 was unable to perform the necessary photographic work, the Respondent again adjusted, as it had in the past, by adding stringers to insure that it met its photographic needs. Quite simply, it did *not* make a unilateral change. Rather, it acted consistent with its long-standing practice of using stringers, when necessary, to meet its needs.

My colleagues argue that the Respondent assigned to stringers the night-weekend work of the full-time photographer (Dimeo). Of course, that happened in January 1995 when Dimeo retired and the work was assigned to stringer Crepp. Subsequently, when Crepp complained that he was unable to perform all of the work, Respondent retained other stringers to perform it. Crepp complained to the Union, and the Union filed the instant charges. In sum, the Union's concern was not the assignment of unit work to the stringer (Crepp), but rather Crepp's complaint that he was losing work to other stringers.

I also disagree with the judge's conclusion that the Respondent unlawfully discharged its striking employees. As set forth by the judge in more detail, the employees began a strike, which I find to be an economic strike, on July 24, 1995.[4] Subsequent efforts to reach an agreement

[1] There is no contention that there is a violation with respect to daytime work during the week.

[2] As set forth by the judge, the photographic "stringers" are individuals who take photographs for the newspaper on an ad hoc basis. They are paid a flat fee for each photo. The parties agree that the stringers are independent contractors and that they are excluded from the bargaining unit.

[3] It appears that this occurred before the Union's certification on December 28, 1993.

[4] Because I have concluded that the Respondent did not commit an unfair labor practice when it used stringers in 1995, I cannot find that the strike, which the judge found was caused in part by the Respon-

and end the strike were unsuccessful. At a negotiating session on March 14, 1996, the parties remained unable to settle their differences. Although the Union had apparently intended, at this meeting, to make an unconditional offer on behalf of the strikers to return to work, it failed to do so.[5] After a caucus at this meeting, the Respondent handed the Union a letter, dated March 13, which stated that, as of that date, the Respondent considered its current replacements to be permanent replacements. Up until this time, the Respondent had maintained that all its replacements were temporary employees. The Respondent, however, did not advise its replacements until the next day, March 15, that they had become permanent replacements.

Based on this, the judge concluded that the Respondent, on March 14, had "falsely" stated that its replacements were permanent and had thereby discharged the striking employees. I cannot agree. I do not believe that the Respondent's March 14 statement was "false." In any event, I would not find that the Respondent's letter conveyed a message of discharge.

On March 14, the Respondent, at the negotiating session, announced that it considered its replacements to be permanent. [6] It did not say that it had completed all aspects of converting the replacements from temporary to permanent. By showing its letter to union representatives, the Respondent accurately advised that it had decided to convert the status of its replacement employees. It had in place a cohesive group of replacement employees who had been working for many months. Consistent with its announced intention, the Respondent completed the conversion in the status of its replacements 1 day later.

This case is quite different from *American Linen Supply Co.,* 297 NLRB 137 (1989), cited by the judge. In *American Linen,* an employer, on the day a strike commenced, informed striking employees—about 10 minutes before the 7 a.m. starting time for work—that they had "until 7 a.m." to "return to work" and if they did not they would be "permanently replaced." In fact, the employer had obtained no replacements whatsoever. Relying on cases holding that an employer who informs lawful economic strikers that they have been permanently replaced when in fact the employer has not "obtained such replacements," the Board reasoned that the employer had made a false statement and had effectively discharged the strikers. Here, in marked contrast, the Respondent had utilized a group of replacement employees for many months. Thus, it had obtained replacements long before March 14. On March 14, the Respondent accurately announced that it now "considered" its replacements permanent, and it finalized its position the next day. The Respondent's March 14 statement was not false and did not convey a message of discharge. Rather, faced with the failure to reach agreement with the Union, the Respondent announced how it intended to proceed.

In *NLRB v. Noel Foods,* 82 F.3d 1113 (D.C. Cir. 1996), the court found, in similar circumstances to this case, that an employer had not discharged its economic strikers. There 2 hours before a strike began, an employer informed employees that it had hired permanent replacements and that employees who went on strike would be permanently replaced. By the time of its statement to employees, the employer had contracted with employment agency to supply replacement workers. The court could not conclude that the employer's statements were "actually false" or that the statements effectively discharged striking employees. The employer had in fact arranged for the hiring of replacements and subsequently the replacements in fact replaced the striking employees.

Here, the Respondent was even further along in the process of utilizing permanent replacements then was the employer in *Noel*. As noted, it had a cohesive group of employees who had been working as replacements for many months. There was no hiring to be done. Rather, as noted, the Respondent needed only confirm with the replacements that they had become permanent replacements and it did this the day after it announced its intention to the Union.

Finally, even if Respondent's statement were "false" (premature by 1 day), it clearly did not convey the message that the strikers were discharged.

The Respondent made no false statements and did not discharge its striking employees. It announced its intention to convert the status of its current replacements and it acted promptly in conformance with its announced intention. There were no discharges. There were no violations of Section 8(a)(3).[7]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

dent's actions regarding the use of stringers, was an unfair labor practice strike.

[5] The judge found that the Union did not make an unconditional offer to return until May 15, 1996.

[6] As noted by the judge, the Respondent's March 13 letter was one addressed from Respondent's vice president, Ryan Kegel to Respondent's management consultant, Donald Smith. The judge found that the Respondent had prepared the letter as part its worst-case scenario strategy in case there was no progress in negotiations.

[7] As I have found that the strikers were economic strikers who were permanently replaced on March 15, 1996, I find that the Respondent did not unlawfully refuse to reinstate the strikers upon the strikers' May 15 unconditional offer to return to work.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally subcontract night and weekend photography work performed by the regular, full-time photographer.

WE WILL NOT unlawfully discharge strikers and failing to reinstate them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order, restore the status quo with respect to the night and weekend photography work performed by the regular, full-time photographer prior to April 15, 1995.

WE WILL, within 14 days from the date of the Order, offer Susan Bertagna, Stacey Book, Barbara Bellisimo, Joyce Bender, Jean Bischoff, May Ann Caputo, Anthony Carrozza, Mark Crepp, Charlene Donley, Harry Elder, Colleen Flecher, Bridget Hysell, Michelle Lamanza, Kim McCarten, Carol McDonald, Blanche Novak, Jill Paschl, Brian Rooney, Raney Senior, Donald Shellenberger, Steve Shinsky, Susan Smith, George Veres, JoEllen Whitlatch, Richard Winchell, and Janet Young full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the employees named above whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, beginning on March 14, 1996.

CITIZENS PUBLISHING AND PRINTING COMPANY

Donald J. Burns and *Suzanne C. McGinnis, Esqs.,* for the General Counsel.

Phillip J. Clark Jr., Esq., of New Castle, Pennsylvania, for the Respondent.

Robert A. Eberle, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on October 15–18 and 21, 1996. The charge in Case 6–CA–27215 was filed on April 18, 1995, and the complaint issued on October 2, 1995. The charge in Case 6–CA–27832 was filed on January 24, 1996, and the charge in Case 6–CA–27832–2, as amended, was filed on June 6, 1996. An order consolidating cases, consolidated complaint and notice of hearing issued for these cases on June 13, 1996, and the consolidated complaint was amended on June 28, 1996. The charges in Cases 6–CA–28147–1 and 28147–2 were filed on May 8, 1996, and the latter 28147–2 were filed on May 8, 1996, and the latter was amended on August 21, 1996. An order further consolidating cases, second amended consolidated complaint, and notice of hearing issued for all these cases on August 28, 1996, and the second amended consolidated complaint was further amended on September 24, 1996.[8] The Respondent's timely answer essentially denied the material allegations of the second amended consolidated complaint, as amended. The parties were afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with an office and place of business in Ellwood City and Beaver Falls, Pennsylvania, is engaged in the publication, circulation, and distribution of the Ellwood City Ledger, a daily newspaper and the Valley Tribune, a weekly newspaper. During the 12-month period preceding December 31, 1995, the Respondent derived gross revenues in excess of $200,000, held membership in or subscribed to various interstate news services, and advertised various nationally sold products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The primary issues are: (1) whether the Respondent unlawfully subcontracted bargaining unit work (i.e., night and weekend photography work) performed by the regular, full-time photographer to "stringers"[9] in violation of Section 8(a)(5) of the Act; (2) whether the strike which commenced on July 24, 1995, was an unfair labor practice strike and, if not, whether it was subsequently converted by the Respondent's conduct to an unfair labor practice strike; (3) whether the Respondent unlawfully filed and maintained a libel lawsuit in state court against various striking employees, a former employee, the Union and its president, the Union's strategic campaign group known as "United for Survival," two nonemployees, and a strike newspaper known as the Ellwood City Press in violation of Section 8(a)(1) of the Act; (4) whether the Respondent unlawfully filed and maintained a libel lawsuit in state court against former employee, L. David Brown, involving the Lincoln Publishing Company, Inc., in violation of Section 8(a)(1) of the Act; (5) whether the Respondent unlawfully continued the aforesaid state court lawsuits after the instant complaint issued in violation of Section 8(a)(1) of the Act; (6) whether the Respondent unlawfully refused to reinstate striking employees George Veres and Richard Winchell on February 17, 1996, in violation

[8] Par. 23 of the second amended consolidated complaint was further amended at the hearing to insert the following language at the end of the paragraph: "thereby constituting an unlawful termination of the employees" named below in par. 25. Par. 25 was also amended to add the names "Susan Bertagna" and "Donald Shellenberger."

[9] Stringers are individuals who contribute stories and/or who take photographs for the newspapers on an ad hoc basis. They are paid by-the-line for articles or a flat fee for each photo.

of Section 8(a)(1) and (3) of the Act; whether the Union made an unconditional offer to return to work on March 14, 1996, and whether the Respondent thereafter unlawfully failed to reinstate the striking employees in violation of Section 8(a)(1) and (3) of the Act; (7) whether the Respondent falsely advised the Union on March 14, 1996, that the strikers had been permanently replaced, thereby unlawfully terminating the striking employees in violation of Section 8(a)(3) and (1) of the Act; and (8) whether the Respondent unlawfully failed to provide the Union with certain requested information on March 14, 1996, and on various dates thereafter, in violation of Section 8(a)(1) and (5) of the Act.

B. Facts

The Respondent is a family owned newspaper corporation, operated by two brothers, W. Ryan Kegel and Scott R. Kegel, who together own the majority of the corporation's stock.[10] W. Ryan Kegel (RKegel) is the vice president and publisher with overall responsibility for the newspaper. Scott R. Kegel (SKegel) is the general manager, who together with RKegel is responsible for all day-to-day operations.

1. Subcontracting and the collective-bargaining negotiations

On December 28, 1993, Teamsters Local No. 261 (Local 261 or Union) was certified as the exclusive collective-bargaining representative for the following unit of Respondent's employees:

> All full-time and regular part-time employees, including Editor, Valley Tribune; Classified Supervisor and Sports Editor employed by the Employer at its Ellwood City and Beaver Falls, Pennsylvania, facilities; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.[11]

Shortly after the Union was certified, negotiations commenced for an initial collective-bargaining agreement.[12] Subcontracting was among the issues discussed. The Union initially opposed any subcontracting whatsoever. The Respondent sought to adhere to past practice. At the bargaining table SKegel explained that the Respondent historically had published articles from various news services, including the Associated Press, as well as from various nationally syndicated columnists, and had used college interns to write stories. He also explained that stringers had been used to write stories and to take night and weekend (nwe) photographs.[13]

a. The use of photographic stringers

Bud Dimeo had been the full-time photographer for the Ellwood City Ledger (Ledger) for over 35 years. He worked days taking photos and doing dark room. The nwe photos were taken by stringers, who were paid a flat fee of approximately $5–6 per picture. The Respondent had used several photographic stringers over the years to cover the night and weekend photographic work, sometimes hiring three to four at a time. For example, in July 1993, the nwe photos were taken by Jim Tammaro (who had his own photography business), Lori Lucarelli, Harry Bazzichi (who also wrote stories as a stringer), and Mark Crepp, who was also employed as the sports editor of the Ledger, a regular full-time job.[14]

At some point the daytime photography work began to decline leaving Bud Dimeo with less to do during the day. When stringer Jim Tammaro stopped taking nwe photographs for the Respondent in August 1993, some of the nwe work was assigned to Dimeo, thereby becoming a part of his regular full-time duties. From August 1993, up until the day he retired in January 1995,[15] Dimeo, along with Crepp, took the bulk of the nwe photos.[16] However, unlike Crepp, Dimeo received no extra compensation for taking nwe photos.

b. The tentative agreement and failed ratification

In the interim, and more specifically on June 3, 1994, the parties tentatively agreed during negotiations that "subcontracting shall continue in accord with past practice." The next day, June 4, the Union came to the bargaining table seeking to adjust Bud Dimeo's working hours. Campbell suggested that the Respondent hire a stringer or a part-time employee to take the nwe photos assigned to Dimeo, which the Respondent summarily rejected. Smith, speaking for the Respondent, explained that the Respondent could no longer afford to carry Dimeo, who spent many hours counting paper clips before the nwe photos were assigned to him. While the Respondent was open to ideas that would not cost more money, it was not inclined to give Dimeo 40 hours' pay to work parttime. Although a followup session between employee Mary Caputo, Dimeo, and SKegel was held to discuss the issue, nothing was resolved.

In late November 1994, the parties reached a tentative agreement on all issues and Campbell and Cummings agreed to hold a union member meeting on December 5 to ratify the agreement. Two days before the meeting, the Union requested some additional concessions, which the Respondent agreed to,

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[10] Ryan and Scott Kegel each own one-third of the corporation's stock. Their father, William Kegel, who is president of the corporation, owns the remaining one-third of the stock.

[11] Also excluded from the unit, and of particular relevance here, were "stringers." The parties agreed that these individuals were independent contractors, who are not covered by the Act.

[12] SKegel, along with Donald Smith, a management consultant, represented the Respondent at the bargaining table. The Union was represented by Local 261 President Douglas Campbell and International Brotherhood of Teamsters (IBT) International Representative Rudy Cummings.

[13] Campbell testified that SKegel did not mention the use of photographer stringers when he described the extent of subcontracting in negotiations. I credit SKegel's version of what was discussed during the negotiations, which is supported by credible evidence, including the Respondent's bargaining notes. In addition, the evidence shows that during the negotiations the Union on more than one occasion sought to persuade the Respondent to hire a photographic stringer in order to relieve Bud Dimeo, a full-time photographer, of his nwe photo duties. This lends credence to SKegel's assertions that the use of photographic stringers was discussed at the bargaining table.

[14] In addition to his regular weekly pay, Crepp earned extra money taking nwe photos for a flat fee per picture. The money earned by Crepp for nwe photo work was added to his regular biweekly pay and taxes were withheld from the total amount earned.

[15] Dimeo and Crepp worked out an arrangement where Crepp took nwe photos on Monday, Wednesday, and Friday and Dimeo took them on Tuesday and Thursday. They also agreed to alternate taking photographs every other biweekly pay and taxes were withheld from the total amount earned.

[16] Occasionally, some nwe photos were taken by stringers Harry Bazzichi and Jan Marshall (a firefighter who submitted photos of fires), as well as Gwenn Sloan and Kitty McGraw, two stringers who wrote stories and occasionally took photos for the Valley Tribune and the Ledger. Bazzachi stopped taking nwe photos altogether in November 1994, and from then until April 1995, there is no evidence that any photographic stringers, other than Crepp, took nwe photos again until stringer Thom Jackson was hired in April 1995.

on the condition that Campbell and Cummings stand before the union membership and recommend ratification of the agreement. The December 5 meeting was postponed. When a ratification vote eventually was taken the tentative agreement was rejected: neither union official had stood before the membership to recommend ratification.

2. Bud Dimeo's retirement and Mark Crepp's new duties

In January 1995, photographer Bud Dimeo retired on short notice. Mark Crepp, the sports editor, became the temporary full-time photographer and Randy Senior, a sports writer, became the temporary sports editor. In addition to his new photography duties, Crepp alternated Saturday mornings with Randy Senior as sports editor. Crepp wrote sports stories, laid out the sports page, and selected sports photos and wire stories. He also was responsible for working on the "Progress Edition," a supplemental business publication that was issued by the Ledger every year in April.[17]

In March 1995, Crepp spoke to Veronica Pacella, editor of the Ledger, about the amount of work that was required to publish the "Progress Edition" by April. He was particularly concerned about getting the photography work finished on time. Crepp was already working 5 nights a week taking evening photos as a result of Dimeo's departure, as well as alternating Saturdays as sports editor.[18] This meant that the weekend photo work that Dimeo would have taken was not getting done.[19]

3. The hiring of photographic stringers and unfair labor practice charge

In mid-March, SKegel spoke to Crepp about the nwe photo work, which was not getting done. He told Crepp that he was going to hire a photographic stringer to help out, which he did. Thom Jackson was hired to take nwe photos, but quit after a few days.[20] A short time later, SKegel informed Crepp that he had hired two more photographic stringers: Heather Manzo and Christopher Robinson. Crepp was told that most of the nwe work would be done by the stringers, but that he had the option to take some sports nwe photographs. After that Crepp took a limited number of nwe photos. He usually covered for the stringers when someone could not make an assignment or when the two stringers could not work something out between themselves.

Crepp nevertheless became concerned that the opportunity to earn additional money in the future would not be available to him, particularly when a full-time photographer was hired and he returned to being the sports editor.[21] He therefore went to the United for Survival[22] office to talk with Local Union President Campbell. Crepp told Campbell that SKegel had taken the nwe photo work away from him and that he had hired two photo stringers to do it.

At the next negotiating session on April 11 the Union asserted that the Respondent had unilaterally removed photography work from the bargaining unit when it took away the nwe photo work from Crepp. The Union demanded that the Respondent rescind its action. The Respondent asserted that it made the change at Crepp's request, relying principally on the concerns that Crepp had shared with Pacella in mid-March. When Campbell spoke to Crepp on the following day to ascertain whether, in fact, he had made such a request, Crepp denied doing so. On April 18, the Union filed an unfair labor practice (ULP) charge alleging that the Respondent had unilaterally changed terms and conditions of employment without bargaining in good faith.

Crepp continued working as the temporary full-time photographer. In the morning he would work in the darkroom. In the afternoon he would take photos. On opposite weekends, Crepp substituted for Senior as sports editor. During this time he also worked as a reporter covering school board meetings and a school board election for which he was paid on an overtime basis. Around the same time, Heather Manzo and Chris Robinson began taking nwe photos.

On May 1, Veronica Pacella, editor of the Ledger, resigned from her position,[23] but agreed to stay on until on May 31. On June 1, Mark Crepp became the acting editor of the Ledger. For several weeks, he worked at the editor's desk from 6 a.m.—1 p.m., took photographs in the afternoon, and occasionally worked evenings in the darkroom for which he received overtime pay. His availability to take nwe photos was almost nonexistent.

In mid-June, photo stringer Robinson quit. SKegel told Crepp that he should decide who would take the nwe photos. Crepp assigned the majority of those photos to stringer Heather Manzo. He also took some nwe photos at the Ellwood City Arts, Crafts, and Food Festival for which he received overtime pay.

4. The strike

On Thursday, July 20, 1995, the Board's Regional Office faxed a letter to Smith informing him that unless the pending ULP charge was settled, a complaint would be issued. The Respondent was given until Tuesday, July 25, to respond. The following day, Friday, July 21, a second letter was faxed to Smith in South Dakota where he was working. A copy was

[17] Crepp was paid an hourly rate for taking daytime photos and doing darkroom work, as well as overtime pay for alternating as sports editor on Saturdays. Although he became the temporary full-time photographer, he continued to receive a flat fee per picture for nwe photos.

[18] Crepp, a divorcee, testified that he usually had his children every other weekend, which precluded him from taking photos on opposite weekends. At times he had to take his children with him to take photos on the weekend.

[19] At least one local high school had complained to RKegel about the lack of media coverage at its sports events and specifically about how Crepp failed to address the problem.

[20] In his testimony, Crepp stated that photographic stringers on the whole were not reliable.

[21] Crepp testified that he was not concerned when Thom Jackson was hired as a photo stringer. He became dismayed, however, when two stringers were hired to replace Jackson, even though he admitted that he did not have a lot of time to take nwe photos.

[22] In early February, the Union initiated a strategic campaign called "United for Survival" which was designed to put pressure on the Respondent to negotiate in good faith. It was a group comprised of Local 261 officials, bargaining unit members, other labor organization members (i.e., SEIU, AFSCME), community supporters and a local ministry society. It had an office in Ellwood City, where weekly meetings were held.

[23] Pacella prepared a letter of resignation claiming that she felt compelled to quit because RKegel allegedly had asked her to lie to the Board in connection with the unfair labor practice charge: an allegation that RKegel flatly denied. However, she did not give the letter to RKegel because she did not know what legal ramifications may result. Instead, she wrote another resignation letter citing as her reason the increasing pressures of the work environment and the criticism of her work on the "Progress Edition." She also consulted an attorney concerning her allegations that RKegel had asked her to lie.

also faxed to Local 261 President Campbell. On Saturday, July 22, Campbell called a meeting of the Union's bargaining committee to discuss the recent developments concerning the ULP charge. He showed them a letter drafted by the Union's attorney for Campbell, which inaccurately alleged that the Respondent had told Crepp "that he would no longer be a photographer and that [it had] subcontracted out the bargaining unit work of photography." The letter also stated that at the April 11 negotiation session the Union demanded that the Respondent rescind its action and bargain over the issue, which the Respondent refused to do. The bargaining committee decided to apprise the bargaining unit members about what had transpired. On Sunday, July 23, a meeting was held to update the bargaining unit members. After reviewing the letter, and acting under the assumption that a complaint was about to be issued, the membership voted to strike.

At 8 a.m., the next day, Monday, July 24, the Union went on strike without notice. As the bargaining unit members arrived for work, they were advised by Campbell and other union officials that the strike had begun. When picketing commenced at the Ledger, the Respondent sought and received injunctive relief in state court enjoining the Union and its members from among other things blocking the ingress and egress of the Respondent's facility. In the meantime, the Respondent continued to publish its newspapers with family, supervisors, and a few bargaining unit employees, who did not engage in the strike. It eventually hired temporary replacements and reinstated two bargaining unit employees who returned to work during the first several weeks of the strike.

In mid-August, the Union encouraged the striking employees to start a strike newspaper, which they did, called the Ellwood City Press (the Press), a weekly publication. The Press was incorporated under Pennsylvania law as a nonprofit corporation by two striking employees: Mary Caputo and Carol MacDonald. It was funded primarily by Local 261 and was staffed by volunteer striking employees and two nonemployees (Mary Ann Gavrile and Charles Moser). Major publishing decisions were made by the editor, Mary Caputo, subject to approval by the Union's executive board. The Press had a checking account which required the dual signatures of Caputo and MacDonald with prior approval of Local 261 President Campbell.

5. The state court libel lawsuits

In late November 1995, a former employee of the Ledger, L. David Brown,[24] who resides in Florida, wrote a letter to the editor of another local newspaper, the South County News (SC News), in which he sympathized with the striking employees. Brown wrote about working for the Ledger when it was run by William Kegel, the father of Ryan and Scott. He described the elder Kegel as a benevolent employer who stood by his word. In contrast, Brown stated, "[W]hen the sons took over, their word was not enough. They would promise you many things but would not stand behind their word." Brown concluded the letter by praising the strikers for "finally standing up and fighting for their rights." The letter was published by the SC News.[25]

Caputo heard about the article from an acquaintance who worked at the SC News. She obtained a copy and showed it to the other strikers, who were appreciative of Brown's support. They sent him a thank you note and an Ellwood City Press T-shirt. A few days before Christmas Brown called Caputo to thank her for the T-shirt and at that time Caputo obtained Brown's permission to reprint the letter in the Press. Brown's letter appeared in the December 30, 1995 edition of the Press.

On January 18, 1996, Ryan and Scott Kegel filed a libel lawsuit in state court naming as defendants, the Press, the local union, Campbell as president of the local union, United for Survival, Mary Caputo, as editor of the Press, L. David Brown, 20 striking employees alleged to be part of the "publishing group" of the Press, and two nonemployee volunteers.[26] The lawsuit alleged that the statements in Brown's letter were false as they reflect on the plaintiffs' character and reputation and that the defendants knew or should have known that the statements were false, but nevertheless published them intentionally and maliciously or with reckless disregard for the truth or falsity. The lawsuit sought damages in excess of $20,000 plus costs.[27]

On January 24, 1996, in response to the filing of the malicious libel lawsuit, the Union filed an unfair labor practice charge against the Respondent on which the General Counsel subsequently issued a complaint alleging that the Respondent's decision to bring and maintain the libel lawsuit violated the Act.[28] Subsequently in the state court, the Union filed a second set of preliminary objections in the Press libel lawsuit, and joined with Lincoln Publishing, Inc. in a motion to stay the proceedings in both lawsuits. In that motion, it was alleged that the state court action was preempted by Federal labor law and that the NLRB should be permitted to hear and decide whether the alleged libelous statements were protected expressions of opinion in the course of a labor dispute. The objections and joint motion were denied by the state court, which retained subject matter jurisdiction.[29]

6. Veres' and Winchell's attempt to return to work

George Veres and Richard Winchell were two long-term employees, who were less than fully committed to the strike from its beginning. After being on strike for more than 6 months with no resolution in sight, they decided in early February 1996 to talk to the Kegels about returning to work. On

[24] Brown worked for more than 20 years for the Respondent. His employment ended sometime in 1987 under less than amicable circumstances.

[25] When RKegel learned of the publication, he phoned the publisher of the SC News to request a retraction, which he did not receive.

[26] In addition to Mary Ann Caputo, the lawsuit named striking employees, Barb Bellisimo, Joyce Bender, Stacy Book, Mark Crepp, Colleen Flecher, Bridget Hysell, Michelle Lamenza, Carol McDonald, Kim McCarten, Blanche Novak, Jill Paschl, Brian Rooney, Randy Senior, George Veres, Joellen Whitlatch, Richard Winchell, Janet Young, Charlene Donley, Susan Smith, and nonemployee volunteers Mary Ann Gavrile and Charles Moser.

[27] On February 6, 1996, a similar lawsuit was filed in state court by the Kegels and the Respondent against the parent corporation of the South County News (Lincoln Publishing, Inc.), its holding company, the newspaper's publisher, managing editor, and bureau chief, as well as L. David Brown.

[28] Because the libel lawsuit was brought by the Kegels, as individuals, against the Union and others, the General Counsel also alleged that the Kegels, as majority stock owners and corporate officials, were alter egos of the Respondent.

[29] By order, dated April 16, 1997, the United States District Court for the Western District of Pennsylvania enjoined further prosecution of the state court libel lawsuit against the Ellwood City Press, the Union and the other defendants. *Gerald Kobell v. Citizens Publishing & Printing Co.,* Civil No. 97-0632 (W.D.Pa., April 16, 1997).

February 17, Veres phoned RKegel and said "I'd like to see if I could come back to work" and could he and Winchell talk to him. A meeting was set up for later that morning at the Ledger. In the meantime, RKegel was apprehensive about talking with the two striking employees so he called Smith to get his advice on what to do. Smith told him to be guarded and to ask if their union representative knew about the meeting.

The meeting was attended by Ryan and Scott Kegel, their secretary Barbara Welsh, Veres and Winchell. RKegel started by asking Veres and Winchell if Campbell, the Union's president, knew that they were meeting with the Kegels. Veres responded, "No," and added that they were through with the Union. He asked if their jobs were still available. Winchell explained that there had been some vandalism to his car. He also said that a few other people might want to come back, including Steve Shinsky, a printer, who could not make the meeting.[30] Winchell explained that some of the strikers were concerned, however, that Don Viccari, a supervisor, would make life difficult for them if they came back. Winchell said that he was currently working and that he would have to give 2 weeks notice. Veres asked about the libel lawsuit, but the Kegels did not respond. The meeting, which lasted about 15 minutes, ended with RKegel telling the two that he would get back to them after he spoke to his representative.

RKegel called Smith to apprise him of what had occurred. He told Smith that Veres and Winchell said that they represented other strikers who were interested in returning to work, but were afraid of Don Viccari. Smith was concerned about talking to strikers who claimed to represent other employees. He was afraid that the Union would file another unfair labor practice against the Respondent alleging that it was bargaining with someone other than the exclusive bargaining representative. He told RKegel not to call either Veres or Winchell and dictated a response to be read to them should either or both call again. The statement read as follows: "A determination will be made on an individual basis when an unconditional offer to return to work is made."

A few days later, Veres called RKegel at home. RKegel read the response prepared by Smith. Veres asked him several times to repeat the statement so he could write it down to tell Winchell. When Veres asked RKegel to explain what the response meant, he declined, saying that he could not say anything more. When Veres hung up, he phoned Winchell and read to him what RKegel had said. Neither one could figure out what it meant, so Veres had his wife call the NLRB seeking an explanation, which was not provided.

A short time later, at a United for Survival meeting, Campbell mentioned that he had heard that someone had talked to the Kegels about returning to work. Veres revealed that he and Winchell had been to see the Kegels. This caused many of the strikers to become upset, but for different reasons. Those fully committed to the strike were angry because they viewed the meeting with the Kegels as an act of disloyalty. Others were dismayed because if the Kegels had not given two longtime employees like Veres and Winchell back their jobs, it did not bode well for everyone else.

[30] Shinsky apparently had called SKegel himself before this meeting to express an interest in returning to work.

7. The exchange of correspondence and the Respondent's March 5 letter

In between the libel lawsuits and the meeting between Veres, Winchell, and the Kegels, an exchange of correspondence took place between the Respondent and the Union. It began with the Union's request, dated January 5, 1996, to resume bargaining[31] and for information concerning the temporary replacements. On January 16, the Respondent answered nine questions presented by the Union concerning the temporary replacements and provided a list with their names, addresses, wage rates, and full-time or part-time status. The Respondent's letter stated that the replacements were temporary and that none of the bargaining unit positions had been eliminated or reduced since the date of the strike.

On receiving the Respondent's letter, the Union requested additional information about the bargaining unit employees who had continued working or had returned to work after the strike. It also sought information about benefits received by the temporary replacements and repeated a request for the applications of those hired since the strike began. Although Smith promptly provided most of the information, he declined to provide the employment applications asserting that he had "confidentiality" concerns. On February 22 the Union again asked the Respondent to identify whether any bargaining unit positions had been eliminated or reduced. Because the Respondent's earlier response seemed to suggest that it was utilizing a smaller workforce, the Union wanted to ascertain which jobs were available "in the event that our members make an unconditional offer to return to work."

By letter, dated March 5, 1996, Smith responded, in relevant part, as follows:

> If, as you suggest in your correspondence, you and your members (our striking employees) should make an unconditional offer to return to work:
>
> *No bargaining unit positions have been eliminated or reduced.
>
> *The facility in Beaver Falls is still being rented by this Employer, equipment is in use, the *Valley Tribune* is still being produced and distributed, no jobs have at this time been reduced or eliminated, although some may not be filled at the present time. As the Client sees it today, all jobs would be available.

The letter ended by saying "None of the temporary replacements are considered to be permanent replacements."

8. The March 14, 1996 negotiation session

A bargaining session was scheduled for March 14, 1996. Two days before, Smith met with the Kegels to discuss the current situation and their bargaining strategy. In the meeting, RKegel asked Smith what he thought about permanently replacing the strikers. When Smith expressed reservations, RKegel replied, "Well, I'm ready to do it right now." To his thinking, the Respondent was into the 8th month of the strike and things had turned around for the Ledger. The temporary replacements were cooperative and doing a good job. It was basically a new work environment. If he could not get a contract with the Union soon, RKegel was ready to act. The next day, March 13, the Kegels and Smith drafted a letter from

[31] The last bargaining session was held on August 9, 1995, at which time the Union withdrew all of its tentatively agreed-on proposals.

RKegel to Smith[32] stating that RKegel now considered the temporary replacements "to be regular permanent replacement employees." On March 14, RKegel printed a copy of the permanent replacement letter and took it with him to a prearranged location where he was to meet with SKegel and Smith during a negotiation caucus.

In preparation for the March 14 session, the Union brought in Thomas J. McGrath, the IBT's director of the Newspaper, Magazine, and Media Workers Division. He had assigned Rudy Cummings to assist Campbell in negotiations and had monitored the strike situation on an irregular basis. There came a time, however, when McGrath realized that the strike was not going anywhere. He prevailed on Campbell to get the negotiations back on track and decided to become personally involved himself. That required McGrath to spend some time with the bargaining committee to come up to speed on the issues. In the course of doing so, the committee told him that if the Employer was willing to give the striking employees the same wage rate that the replacements were receiving, that would provide the basis for consummating a collective-bargaining agreement.

McGrath, however, had one other concern. After reviewing the correspondence between Campbell and Smith, and in particular Smith's March 5 letter, he could not accept Smith's representation that all jobs would be available if an unconditional offer to return to work was made. He therefore asked the bargaining committee to prepare a list of jobs, and the employees who had performed those jobs, so he could compare it against a list of jobs presently being performed by the replacements. With this information, McGrath went to the negotiation session.

Accompanying McGrath to the March 14 negotiation session were bargaining committee members Mary Caputo and Barb Bellissimo, Local Union President Campbell, and another IBT representative named Joe Molinaro, who worked parttime in McGrath's division. Seated on the other side of the table were Smith, Skegel, and Barbara Welsh, who took notes. A Federal Mediator named John Pinto also was present. There was no advance notice that McGrath would be substituting for Rudy Cummings at the bargaining table. Smith was surprised to see a new face at this stage of the negotiations and formal introductions were slow in the making. Once that was behind them, Smith began by stating, "I understand that the Union plans to make an unconditional offer to return to work today." McGrath responded yes, that the offer would be for everyone, but he first needed some additional information. He had heard that the replacements were receiving a wage rate that was higher than what strikers had received, so he asked if the strikers would receive the higher wage rate when they returned.[33] He was told they would not. Smith said that the strikers would receive the wage rate that they were getting when they struck. McGrath then began asking questions about the March 5 letter seeking to ascertain the positions to which the striking employees could return. When he asked about the status of the Valley Tribune and the status of Caputo's position, Smith told him that all jobs would be available. McGrath remained unconvinced and Smith tried to reassure him that the Respondent was committed to what was stated in the March 5 letter.

McGrath, however, was still skeptical. He had a list of employees who went out on strike (part of his bargaining notes, as he put it), which he wanted to "marry" with a list of replacements and the jobs they were performing. McGrath sought to cross-check his list against the jobs which were being performed by the replacements to make sure that everyone returning came back to a job and optimally the same job that they performed before the strike began. Unfortunately there were 47 names on McGrath's list of strikers, which far exceeded the number of employees that went out on strike. When McGrath began to read off a few names, Smith cut him off because some of the people on McGrath's list had resigned. Smith exclaimed, "Who are you talking about?" McGrath responded, "I'm making an unconditional offer on behalf of everybody who went on strike in July. That's who I'm talking about."[34] When Smith asked to look at his list, McGrath refused to show it to him. The negotiations then took a turn for the worse. McGrath demanded to see the personnel files of all the replacement to ascertain who was a temporary replacements and who was not. Smith stated that all the replacements were temporary and that he would not provide the files. McGrath backed off saying that he needed a list identifying the replacements and the jobs that they performed. A caucus was requested by Smith to consider the request.

Smith, SKegel, and Barb Welsh drove to a nearby restaurant where they had prearranged to meet with RKegel. The two negotiators basically reported that the negotiations were going nowhere. A fourth chief spokesman (i.e., McGrath) had unexpectedly showed up and the Union had not placed anything on the table. Smith and SKegel felt that the Union was playing games. RKegel agreed. He had the March 13 letter in his pocket. Because no progress was being made at the bargaining table, he gave it to Smith with instructions to give the letter to the Union.

Two hours passed before Smith and SKegel returned to the bargaining table. Smith entered the room, sat down, and told McGrath that the Respondent had always thought that the strike was an economic strike. He then handed him the letter signed by RKegel. McGrath continued talking as he read the letter. He asked again for the information that he had requested before the caucus. A shouting match between McGrath and Smith followed which ended with McGrath demanding that the Respondent pro-

[32] The record does not disclose why the letter was addressed to Smith, rather than the Union. Nor did anyone explain precisely why RKegel wrote the letter on March 13. The evidence supports a reasonable inference, however, that this was part of the Respondent's worst case scenario strategy in the event that progress was not being made in negotiations. The evidence reflects that the Kegels were concerned about taking back the strikers without a collective-bargaining agreement, because they feared that the strikers could go out on strike again without notice.

[33] The General Counsel has not alleged that the higher wage purportedly paid to the temporary replacements violated the Act nor did he present any argument or evidence with respect to this issue.

[34] In contrast, on cross-examination, McGrath equivocated about whether he actually made an unconditional offer. When asked why on March 14, he simply did not come out and say "We accept the fact that all jobs are available and hereby make an unconditional offer to return to work," he responded by saying: "If my mother had raised a very dumb child, it [sic] could have said that . . . I simply couldn't possibly accept that as being true." In an earlier affidavit taken by the General Counsel, McGrath also stated that he "intended" to make an unconditional offer to return to work." He testified at the hearing that he had not done so (i.e., that he had not made an unconditional offer) at that point in the negotiations (TR. 777) because "my plan was to get replies to this arrangement when he [Smith] came back from lunch and then to give him a formal written return to work request." (TR. 781.)

duce the personnel files for the replacements. McGrath also wanted to continue bargaining the next day, but Smith stated that he was unavailable to meet and that he would get back to them with available dates.

On March 20, Smith provided McGrath a list, which identified replacements and striking employees and attempted to identify job functions formally performed by the strikers that were currently being performed by the replacements. Campbell was not satisfied with the list, which he thought was confusing and unresponsive. Over the next several weeks, he continued to press for the information requested at that session, as well as for some dates and times to resume negotiations.

The next bargaining session, which lasted only 5 minutes, was held on May 13, 1996. It quickly erupted into a heated argument with name calling. Two days later, on May 15, Campbell sent Smith a letter seeking to establish future bargaining dates. In that letter, Campbell stated that he wanted to "reconfirm" that "each of the employees represented by Local 261 is making an unconditional offer to return to work, at all times since March 14, 1996."[35] In a reply letter, dated May 21, Smith asserted that Campbell's May 15 letter was the first time the Union made an unconditional offer to return to work. Although subsequent negotiation sessions were held, they were not productive and a collective-bargaining agreement was never consummated.

C. Analysis and Findings

1. The subcontracting of bargaining unit work

Paragraph 31 of the second amended consolidated complaint, as amended, alleges:

> Since about April 4, 1995, and on various dates thereafter during the months of April through July 1995, Respondent removed photography work from the bargaining unit employees and subcontracted such work to "stringers" and reduced or eliminated bargaining unit positions and related work and/or changed and eliminated work duties of certain of its bargaining unit employees which conduct resulted in material and substantial alteration to the unit employees' terms and conditions of employment.

The General Counsel asserts that when SKegel hired photographic stringers Heather Manzo and Christopher and told Mark Crepp that these individuals were to take the majority of nwe photos, it unilaterally implemented a change in the terms and conditions of employment, which violated the Act. The Respondent asserts that it was a longstanding practice to use stringers to take nwe photos and that the hiring of two photographic stringers in April 1995, was not a change, but represented the status quo. A review of who performed what duties and when is key to determining whether a past practice existed and whether the Respondent's conduct violated the Act.

a. Bargaining unit work

As of August 1993 nwe photo work became an integral part of the regular full-time photographer's job. The evidence establishes that without that work, there would not have been enough work to sustain a full-time photographer position.[36] The bulk of the nwe photo work was taken by Dimeo and Crepp (as a stringer)[37] from that time forward to keep Dimeo busy as the full-time photographer and because Crepp asked for as much extra work as possible because he needed the money. This was the situation which existed when the Union was certified in December 1993 and thereafter. I therefore find that at the time the Union was certified as the exclusive bargaining representative and thereafter, taking nwe photos was an essential part of the bargaining unit work performed by the full-time photographer.

b. The past practice

The evidence also discloses that the Respondent had used "stringers" to take nwe photos both before and after the Union was certified. Crepp testified that for as long he was employed by the Ledger there were numerous stringers, including himself, taking nwe photos as independent contractors paid on a per picture basis. He worked on and off as a stringer in 1983, resumed taking nwe photos intermittently in late 1992, and then did so on a regular basis starting in 1993. Gwenn Sloan and Kitty McGraw wrote stories and occasionally took nwe photos as stringers for the Valley Tribune and Ledger at least during 1993. Harry Bazzichi occasionally took nwe photos up until November 1994.

There is no evidence, however, that at any time after August 1993, the Respondent used stringers to do the nwe photo work that became part of Dimeo's full-time photographer job in 1993. That would have defeated the purpose for making nwe photo work a part of the full-time photographer position, which was to keep the photographer busy on a full-time basis. When the Union asked the Respondent during negotiations to relieve Dimeo of his nwe photo duties by hiring a stringer or a part-time person, the Respondent refused, stating that Dimeo would have little work to do if the nwe photo work was reassigned. I therefore find that the "past practice" of using stringers to take nwe photos did not extend to or include performing the bargaining unit work of the full-time photographer.

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[35] Campbell's May 15 letter is inconsistent with a letter he sent to Smith on March 26, which characterized, in part, what transpired at the March 14 negotiating session. Notably the earlier letter stated that the Union had asked for certain information "in order to properly advise the employees who were prepared to make unconditional offers to return to work." It did not state that an unconditional offer had been made.

[36] This point was made very clear at the bargaining table in June 1994, when the Respondent rejected the Union's proposal to hire a stringer or part-time person to perform the nwe photo work that was assigned to the full-time photographer, Dimeo. Smith testified that it was explained to Campbell that the Respondent was not going to pay Dimeo on a full-time basis to work part-time, which is what he would be doing, if the nwe photo work was removed from his job.

[37] The General Counsel contends that Crepp was not a stringer once he began taking nwe photos on a regular basis in 1993 because the flat fees per picture he earned were included with his regular pay as sports editor and subjected to deductions for taxes. I do not agree. Simply because flat fees per picture were rolled into Crepp's regular pay does not alter what he did, when he did it, and how he got paid (i.e., on a flat fee per picture basis). Nor does it alter the fact that taking nwe photos was not part of his regular duties as sports editor, a position within the bargaining unit. Crepp did not have a right or any obligation to take nwe photos as sports editor or as a stringer. The credible evidence establishes that the Respondent permitted him to take nwe photos because he needed to earn extra money. Crepp unequivocally testified that what he earned taking nwe photos was in addition to what he earned as a sports editor. I therefore find that Crepp was a "stringer" at all times he took nwe photos.

c. The applicable legal standard

In *Bottom Line Enterprises,* 302 NLRB 373 (1991), the Board held that when, as here, the parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board recognized two limited exceptions to this general rule: (1) when a union engages in tactics designed to delay bargaining and (2) "when economic exigencies compel prompt action." Id. at 374.

In *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board elaborated further that there are two categories of "economic exigencies" under the *Bottom Line* limited exception.[38] The first category is economic circumstances so compelling that unilateral action is justified and no bargaining whatsoever is required. There is no evidence in this case to support the application of that exception, therefore, further discussion of that category is unnecessary. The second category pertains to circumstances that require "prompt action" and cannot await final agreement or impasse on the collective-bargaining agreement as a whole. Under those circumstances, the employer will satisfy its statutory duty to bargain over the changes proposed to respond to the exigency by providing adequate notice and an opportunity to bargain over the proposed changes and by bargaining to impasse on the particular proposal. The Board cautiously added, however, that not every change proposed for business reasons would meet the *Bottom Line* limited exception. Rather, this exception is limited to those exigencies where time is of the essence and which demand prompt action. In order for an employer to show that a proposed change was "compelled," it must demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. Id. at 82.

The evidence does not establish that an economic exigency existed. The inability of Crepp to take the nwe photos was not caused by external events nor was it beyond the Respondent's control. It was due to Crepp's taking on too many responsibilities in an effort to make extra money working overtime and to the Respondent's failure to properly assign duties to Crepp. It could have been avoided if the Respondent had monitored what Crepp was doing and limited his duties to that of the full-time photographer, leaving the Saturday sports editor work to the acting sports editor and the reporting work to the reporters. In addition, the problem was reasonably foreseeable because when Dimeo retired on short notice, the Respondent knew or should have known that one person (Crepp) would not be able to perform the work of 1-1/2 people (Dimeo and Crepp) while working at the same time as the sports editor on alternate Saturdays, as a reporter for the school board elections, and assisting in publishing the Progress Edition. Finally, the problem did not develop all of a sudden. It gradually became worse as Crepp was permitted to become involved in activities beyond taking photographs.

Even if the Respondent was facing an economic exigency, the Act was violated because the Respondent did not provide the Union with the required notice and an opportunity to bargain over the subcontracting of bargaining unit work (nwe photos) performed by the regular, full-time photographer. Rather, it unilaterally implemented its decision solely for its own benefit and to serve its own purpose, after previously rejecting a Union proposal to do basically the same thing. When the Union demanded at the bargaining table on April 11 that the unilateral decision be rescinded, the Respondent said that it would look into the matter and get back to them, which did not happen. The evidence therefore establishes that the Respondent acted in complete derogation of the collective-bargaining relationship by unilaterally removing bargaining unit work, which was an integral part of the full-time photographer's position, solely for its own benefit.[39]

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act, when it unilaterally subcontracted to stringers the nwe photo work of the full-time photographer, thereby unilaterally removing such work from the bargaining unit.[40]

I further find that the strike, which occurred on July 24, 1995, was an unfair labor practice strike. The evidence establishes that the impetus for the decision to strike was the letter received from the Board's Regional Office that it was going to issue an unfair labor practice complaint alleging that the Respondent had violated the Act by subcontracting nwe photo work to nonbargaining unit individuals. News of the General Counsel's letter galvanized the bargaining unit members' belief that an unfair labor practice had been committed and served as the flashpoint for discussion about calling a strike.[41] The testimonies of strik-

[38] The General Counsel cites *Marriott In-Flite Services,* 258 NLRB 755 (1981); and *Gresham Transfer,* 272 NLRB 484 (1984), for the proposition that "during contract negotiations, an employer may not implement proposed changes or those tentatively agreed to by the parties, even if an opportunity to bargain is first given the union, absent of valid pre-existing impasse [or] consent of the union." G.C. Br. at 30. These cases, however, predate the Board's decision in *Bottom Line Enterprises,* supra, and its progeny, which provide the appropriate analytical framework for this case. The Respondent does not cite any cases in its posthearing brief in support of its argument that it followed past practice and did not change the status quo. See R.Br. at 43–48. The only cases the Respondent cites on this issue relate to its argument that the strike, which followed the subcontracting was an economic strike, even if an unfair labor practice was committed.

[39] There is no other reason which would excuse the Respondent's failure to notify the Union and to provide an opportunity to bargain. There is no evidence that in the context of discussing past practice, SKegel or anyone else for the Respondent discussed using stringers to perform the nwe photo work of the regular, full-time photographer. The parties were not at impasse and the Union did not waive the right to bargain on this issue.

[40] The Respondent argues, and the evidence supports, that Crepp did not lose any money when the nwe photos were assigned to the stringers because he was paid overtime for other duties, which compensated him for the flat fees he would have received had he taken the nwe photos. While that may be relevant to the issue of back pay, the important point is that when the Respondent assigned the nwe photos to the stringers, it took work from a bargaining unit position (i.e., the only full-time photographer position). The evidence amply demonstrates that without the nwe photos there would not have been enough work to sustain the full-time bargaining unit position. That is the reason the Respondent added nwe photos to the photographer's job in August 1993. That also is the reason why the Respondent rejected the Union's proposal during negotiations to relieve Dimeo of nwe photos. Therefore, the impact of subcontracting on a bargaining unit position was not de minimus.

[41] Union President Campbell acted deceptively when he showed the Union bargaining committee members a letter, dated July 21, 1995, prepared by the Union's attorney to RKegel, which erroneously stated that the Respondent told Crepp he no longer would be a photographer and that it had subcontracted out all the photography work. While this

ers Mary Caputo, Carol McDonald, and Mark Crepp, which I credit, establish that the strike which began on July 24, 1995, was precipitated by the subcontracting and the General Counsel's decision to issue an unfair labor practice complaint.[42] I therefore find that the July 24 strike was an unfair labor practice strike.

2. The filing and maintaining of state court libel lawsuits

Paragraphs 13–20 of the second amended consolidated complaint, as amended, which pertain to the state court libel lawsuits precipitated by the letter written by L. David Brown and published in the Ellwood City Press and South County News, allege three separate violations of Section 8(a)(1) of the Act. First, it is alleged that W. Ryan Kegel and Scott R. Kegel, as alter egos of Respondent, violated the Act by filing and maintaining the Press lawsuit[43] in retaliation against all the defendants therein. Next, it is alleged that the Act was violated by filing and maintaining the separate Lincoln Publishing lawsuit in retaliation against L. David Brown.[44] Finally, it is alleged that the Respondent separately violated the Act by continuing to maintain both lawsuits after the Regional Director issued the complaint.

In *Loehmann's Plaza I,* 305 NLRB 663 (1991),[45] the Board established a bifurcated analysis for determining whether an employer, who files a state court lawsuit, violates Section 8(a)(1) of the Act. Prior to the issuance of the NLRB's complaint, the lawfulness of a state court lawsuit must be evaluated under the standards set forth in *Bill Johnson's Restaurant v. NLRB,* 461 U.S. 731 (1983). However, once a complaint has been issued, a different analysis is required. At that point, and thereafter, the state court lawsuit is preempted, and an evaluation relying on traditional labor law principles must be made. *Loehmann's Plaza I,* supra at 670–671.

In the present case, however, there is a preliminary issue which must be resolved before conducting a bifurcated analysis; that is, whether the Kegels were acting as alter egos of the corporate Respondent when they filed the state court lawsuits.

a. The alleged alter ego status

Contrary to the General Counsel's assertions, the alter ego doctrine is inapplicable. The doctrine was developed to prevent employers from evading their statutory obligations merely by changing or altering their corporate form. It requires the existence of two entities, at some point in time, one of which is a disguised continuance of the other. The doctrine does not apply in the present case because there is no entity other than the corporate Respondent, Citizen Publishing & Printing Company. The Kegels sued in state court in their individual capacities and at least in the Press' lawsuit, they were the only plaintiffs. There is no evidence that the Kegels, individually or otherwise, sought to do business in a manner intended to relieve the corporate Respondent of its statutory obligations. See *Fugazy Continental Corp.,* 265 NLRB 1301 (1982); *Cofab, Inc.,* 322 NLRB 162 (1996) (discussing the factors considered by the Board in determining whether an alter ego relationship exists). I therefore find that the General Counsel's reliance on the alter ego doctrine is misplaced.

Where the Board has held an individual liable for the unfair labor practice of a corporation, it has employed a veil-piercing analysis. *AAA Fire Sprinkler, Inc.,* 322 NLRB 69 (1996) (where contrary to the administrative law judge, who relied on alter ego doctrine, the Board used the veil-piercing analysis to impose personal liability). That analysis is likewise inapplicable here because there is no evidence that the Kegels disregarded the separate identity of the corporation, utilized its assets for personal gain and adhered to a corporate form which would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. *See White Oak Coal,* 318 NLRB 732 (1995).

What the General Counsel really seeks to establish and in essence what he argues in his brief (GC Br. at 51, fn. 63) is that the Kegels' actions in filing the state court lawsuits are imputable to the Respondent corporation, under the common law agency principle of respondeat superior. The General Counsel cites two cases, which are not alter ego cases, in support of his position concerning the liability of a corporation for actions by a supervisor. In *Consolidated Edison Co.,* 286 NLRB 1031, 1033 (1987), the Board found that threats made by a division manager against an employee during a grievance meeting and afterwards involved a form of retaliation by a supervisor within the framework of his supervisory responsibilities in violation of the Act.[46] In contrast, in *Postal Service,* 275 NLRB 360

evidence reflects that the Union may have had an ulterior motive for wanting to call a strike (e.g., so that the strikers could received unemployment benefits), it does not alter the fact that the bargaining committee members actually believed that the Respondent had unlawfully subcontracted bargaining unit work in violation of the Act.

[42] The Respondent argues that even if the subcontracting violated the Act, the strike was not an unfair labor practice strike. The Respondent asserts that there was no causal connection between the subcontracting and the strike because three months passed before the Union called a strike. I do not agree. Three months is not a long time between when the unfair labor practice was committed and when the strike was called. Moreover, less than 72 hours passed between the time that the Union found out that the Board's Regional Office was going to issue a complaint and when the strike was called. The Respondent also argues that the strike was an economic strike, relying on various flyers and letters distributed both immediately before and after the strike was called, which drew attention to the economic concerns of the strikers. (See Proposed Findings of Fact, R.Br. at 20–21.) At best this evidence demonstrates that the strike was caused in part by the unfair labor practice and in part for economic reasons. As the Respondent concedes "a strike which is caused in whole or in part by an employer's unfair labor practice is an unfair labor practice strike. *Northern Wire Corp. v. NLRB,* 887 F.2d 1313, 1319 (7th Cir. 1989)." (R.Br. at 42.)

[43] W. Ryan Kegel and Scott R. Kegel are the only plaintiffs in the Press lawsuit.

[44] The complaint asserts that both lawsuits "lack a reasonable basis in fact or law since the published statement written by Brown is a protected expression of opinion."

[45] At the Board's request, *Loehmann's Plaza I,* was remanded for reconsideration by the U.S. Court of Appeals for the Sixth Circuit in light of the Supreme Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). In *Loehmann's Plaza II,* the Board reversed itself and dismissed the allegation that the employer violated the Act by pursuing a state court lawsuit after the complaint was filed. That decision, however, did not alter the bifurcated analytical framework, which was established by the Board in *Loehmann's Plaza I.* See, e.g., *Bakery Workers Local 6 (Stroehmann Bakeries),* 320 NLRB 133 (1995) (where the Board found that the respondent's Federal district court action was preempted at the time the complaint was issued, but found no violation of the Act under traditional NLRA principles. The Board then undertook a *Bill Johnson's* analysis, presumably for the precomplaint period, finding that the General Counsel had not sustained his burden under that theory either.

[46] Importantly, the Board in *Consolidated Edison Co.,* distinguished a threat to file a lawsuit from the actual filing of a lawsuit. "In the

(1985), the Board found that the remarks of a temporary low-level supervisor concerning a threat to file a lawsuit could not be construed to be a retaliatory threat within the framework of supervisor's responsibilities and were not attributable to the employer.

The present case, while not on all fours with *Consolidated Edison, Co.,*[47] falls within its parameters. The Kegels together own a majority of the corporate stock, are its principal officers, and have split the responsibility for all policy and day-to-day decisions. In other words, they are not low level supervisors. Also, as the pleadings in the Lincoln Publishing lawsuit allege, there is a close identity between the Kegels' individual names and the name of the corporate Respondent.[48] (See CP Exh. 89, pars. 23–27.) What the Kegels say and do impacts the corporate Respondent. Likewise, what is said about the Kegels impacts the corporate Respondent, as they allege in the Lincoln Publishing pleadings. Finally, the evidence establishes both lawsuits are singularly focused on the statement that as employers, the Kegels, are not truthful with their employees and therefore the lawsuits are a reaction to the statement about how the Kegels carry out their responsibilities as employers, managers, and supervisors. The evidence therefore supports the conclusion that the Kegels were acting on behalf of the corporation, as much as on their own behalf.

I therefore find that the actions of the Kegels in filing and maintaining both lawsuits are imputable to the corporate Respondent. To hold otherwise, simply because the corporate Respondent is not a party plaintiff in the Press lawsuit, would reward artful pleading, and exalt form over substance.

b. The precomplaint pursuit of the state court lawsuits

In *Bill Johnson's,* supra, the Supreme Court held that the Board may not enjoin a state court lawsuit as an unfair labor practice unless (1) the lawsuit lacks a reasonable basis in fact or law and (2) the lawsuit was filed with a retaliatory motive. The Court stated that when an employer's state court lawsuit against an employee presents a genuine issue of material fact, the employer's First Amendment interest in filing the lawsuit, in having the factual issues resolved by a jury, and the State's interest in protecting its citizens, empowers the state court, and not the Board, to resolve the factual issues presented. The Court concluded that "if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact" the Board must stay its unfair labor practice proceedings until the state court lawsuit has been concluded.[49] 461 U.S. at 746–747.

(1) The Press lawsuit

Several factual issues exist with respect to the Press lawsuit which preclude proceeding further with this aspect of the complaint. First, the evidence discloses a factual issue as to whether the striking employees who were volunteers at the Press (and the two nonemployees working in concert with them), are proper party defendants to that lawsuit.[50] The Respondent, in reliance on certain Teamsters publications, determined that the Press was published by the striking employees. In its answers to interrogatories in the Press lawsuit, the Charging Party stated that the Press was published by Local 261, and that the striking employees were indirectly responsible for publishing the Press as a result of their membership in the Union. (CP Exh. 79, answers to deft. interrogatories 5 and 7.) Whether, and to what degree, the striking employees and others were responsible for publication of the allegedly libelous statement presents a factual issue for the state court to decide. See *Skeoch v. Ottley,* 377 F.2d 804 (3d Cir. 1967).

There is also a factual issue as to whether the statement by L. David Brown that the Kegels have been untruthful to their employees is false. The Kegels deny the allegation in their testimonies and in their complaint in the Press lawsuit. At the hearing, however, the General Counsel presented evidence, presumably to show that RKegel is untrustworthy, that he asked Veronica Pacella, the former editor of the Ledger, and Jill Paschl, a striking employee, to lie to the NLRB, which RKegel denied. This raises a genuine issue of material fact that turns on the credibility of witnesses.

Third, there is the question of whether the statement by L. David Brown was made and published with actual malice. The issue is first raised in allegations of Press complaint, which on its face, would satisfy the malice requirement imposed by Federal law. *Linn v. Plant Guard Workers Local 114,* 383 U.S. 53, 64–65 (1966). The evidence also shows that Brown left the Respondent's employ on less than amicable terms, which he describes in the very first paragraph of his letter to the editor. SKegel essentially denied Brown's assertion that he was mistreated, which calls into question whether Brown had an ax to grind after many years which colored his perception of his dealings with the Kegels. Whether and to what extent the editor of the Press sought to inquire/determine the basis for Brown's statement before publishing the same[51] raises a material factual issue.

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latter situation, a concern for a party's constitutional right of access to judicial forums must also be considered. Cf. *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983),"supra at 1033 fn. 8. In other words, even if the Kegels' action could be attributable to the Respondent corporation, the Board has intimated that where, as here, a lawsuit has been actually filed a *Bill Johnson's* analysis would be required in order to determine whether the Act was violated.

[47] The Respondent does not dispute that the corporate Respondent can be held liable for the actions of the Kegels, regardless of the theory.

[48] The Press lawsuit also alleges that the Kegels "are involved in the publishing of two newspapers known as the Ellwood City Ledger and the Valley Tribune, W. Ryan Kegel being publisher of said newspapers, and Scott Kegel being the general manager of said newspapers. . . [t]he statements contained in the article were intended to and did convey to the readers thereof either directly or by implication that plaintiffs W. Ryan Kegel and Scott Kegel are untruthful, that they lie to their employees and they should not be afforded credibility." (C.P. Exh. 74, pars. 43 & 42, respectively.)

[49] *Bill Johnson's* clearly places the burden on the Respondent to show that factual or legal issues are in dispute. 461 U.S. at 746.

[50] A similar factual issue exists as to whether United for Survival is a proper party defendant.

[51] Further evidence that a reasonable basis exists for the Press lawsuit is the fact that on November 12, 1996, the state court overruled the defendants' second set of preliminary objections, which argued Federal preemption based on *Linn,* and also denied that a joint motion for stay of the proceedings by defendants in both the Press and Lincoln Publishing lawsuits. The state court's rulings arguably establish that the Respondent's lawsuit had a reasonable basis. *Bill Johnson's Restaurants,* 290 NLRB 29, 31 (1988) (where on remand the Board concluded that the employer violated Sec. 8(a)(4) and (1) by pursuing its business interference claims in state court, but found no violation of the Act with respect to the employer's libel claim because the General Counsel failed to show that the libel claim was baseless).

The General Counsel nevertheless argues that the state court lawsuits, as a matter of law, do not establish a state cause of action under the actual malice standard established by *Linn,* because the statement by Brown was merely an expression of his opinion. The argument is unpersuasive because whether Brown's statement is fact or opinion, as the General Counsel suggests, is a question of law for the state court to determine. See *Dougherty v. Boyertown,* 547 A.2d 778, 785 (Pa. Super. 1988). While *Linn* imposed the Federal standard enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), for determining actual malice, it stopped short of fashioning a Federal standard for distinguishing fact from opinion and the General Counsel has cited no authority for doing so.

Finally, the General Counsel asserts that there is no reasonable basis for the state court lawsuits because the statement made by Brown and published in the newspapers is tantamount to calling the Employer a liar, which is not uncommon in the course of a labor dispute nor is it so intemperate, abusive, or inaccurate as to remove it from the protection of Section 7. I do not agree. *Linn* teaches that a malicious defamation, even in the context of a labor dispute, is not protected under the Act.

I therefore find that a reasonable basis, as defined in *Bill Johnson's,* has been established with respect to the Press lawsuit. Accordingly, these proceedings are stayed until the state court lawsuit is concluded. If the Respondent prevails, then there would be no basis for the finding a violation of the Act. If the Respondent does not prevail, then the issue becomes whether the Press lawsuit was filed and maintained for a retaliatory reason.[52]

(2) The Lincoln Publishing lawsuit

Similar factual issues as to whether Brown's statement was false, fact or opinion, and made with malice are present in the Lincoln Publishing lawsuit. However, I find that Brown's statement does not fall within the ambit of Section 7's protection, thus even if there was no reasonable basis for the Respondent to file and maintain the Lincoln Publishing lawsuit, no violation of the Act occurred. Section 7 of the Act provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[53] Brown, however, is not an employee of the Respondent or anyone else. His employment with the Respondent ended approximately 9 years before he submitted the letter to the editor of the South County News. There is no evidence that he acted in concert with the striking employees or the Union. There is no evidence that he either spoke or corresponded with any of the striking employees or the Union before he submitted the letter to the South County News. While the letter is "supportive" of the Union's cause it is peripheral to their labor dispute. Brown's relationship with the striking employees is so attenuated that it cannot be fairly said that his conduct falls within the "mutual aid or protection" clause. Cf. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 568–569 (1978). Moreover, the South County News is not a union sponsored newspaper nor do the strikers or the Union have any involvement with it. Naming Brown as a defendant no more invokes the protection of the Act than naming the publisher, Lincoln Publishing Company, Inc., as a defendant, which the General Counsel tacitly concedes does not establish a basis for a violation. Accordingly, I shall recommend that the allegations of the complaint as they pertain to the Lincoln Publishing lawsuit be dismissed.

c. The postcomplaint pursuit of the state court lawsuits.

As set forth above, the Board in *Loehmann's Plaza I,* held that once the General Counsel issues a complaint, the state court action is preempted and an analysis different from *Bill Johnson's* is warranted with respect to the Respondent's postcomplaint pursuit of the state court lawsuit.[54] "Rather, the 'normal' requirements of established law apply." *Loehmann's Plaza I,* supra. The employer's preempted lawsuit must be found to be unlawful under traditional NLRA principles. In the present case, it is the General Counsel's burden to show that the publication of Brown's letter was protected activity and that the Press lawsuit tended to interfere with Section 7 rights thereby violating Section 8(a)(1) of the Act. *Loehmann's Plaza II,* supra, 316 NLRB at 114.[55] I find that the General Counsel has not met his burden. The allegations of actual malice in the Press[56] lawsuit and the existing factual issues concerning those allegations, preclude a finding at this juncture that the lawsuit was baseless. The absence of evidence establishing that the Respondent's libel lawsuit is baseless, precludes a finding that L. David Brown's letter and the publication thereof were protected activity (in accordance with *Linn*) and therefore, no violation of the Act can be found because a lawsuit to enjoin activity that is not protected is not unlawful.[57] Accordingly, I shall recommend that the allegations concerning the postcomplaint pursuit of the state court lawsuit be dismissed.[58]

3. The failure to reinstate Veres and Winchell

The General Counsel alleges that the Respondent failed to reinstate striking employees, George Veres and Richard Winchell, after they made an unconditional offer to return to work on February 17, 1996. Both Veres and Winchell testified that they told Ryan and Scott Kegel that they wanted to return

[52] It is conceivable that the Respondent could prevail as to some defendants, but not others.

[53] The General Counsel alleges that Brown's statement was protected by Sec. 7 and therefore the Lincoln Publishing lawsuit as it pertains to Brown violated the Act.

[54] Although the issuance of a complaint preempts the state court lawsuit, the pursuit of the lawsuit afterwards does not automatically constitute a violation of the Act. Absent a finding that the activity in question is protected, no violation exists because a lawsuit to enjoin unprotected activity is not unlawful. See *Loehmann's Plaza II,* supra; *Bakery Workers Local 6 (Stroehmann Bakeries)* 320 NLRB 133 (1995).

[55] In *Bakery Workers Local 6 (Stroehmann Bakeries)* supra, and *Phoenix Newspapers,* 294 NLRB 47 (1989), the respective court actions had concluded by the time the matters where decided by the Board. In *Bill Johnson's Restaurants* (on remand), supra, the state court lawsuit had been concluded through the parties' settlement of the libel claim. Unlike those cases, the issue here is whether a pending state court lawsuit constitutes an unfair labor practice.

[56] In light of my previous finding with respect to the Lincoln Publishing lawsuit, I find that no basis exists for finding a postcomplaint violation with respect to that lawsuit, and I shall therefore recommended that the allegations in the complaint as they pertain to the pursuit of the postcomplaint Lincoln Publishing lawsuit be dismissed.

[57] The General Counsel cites *Phoenix Newspapers,* in support of its position. I find the case is inapposite. It predates *Loehmann's Plaza I,* and therefore does not even address the issue of postcomplaint preemption. Also, as noted above, the state court case had concluded in *Phoenix Newspapers,* which provided an evidentiary starting point for deciding whether the Act was violated.

[58] To stay this part of the proceeding while awaiting the conclusion of the state court lawsuit would be contrary to teachings of *Bill Johnson's* and *Loehmann's Plaza I.*

to work, if their jobs were still available. The Kegels acknowledge that both individuals asked if their jobs were still available, but they deny that the two striking employees said that they wanted to return to work. Rather, according to the Kegels, Veres and Winchell equivocated, indicating that they represented several striking employees who were interested in returning to their jobs. I credit the testimonies of Ryan and Scott Kegel, and I find that Veres and Winchell did not make an unconditional offer to return to work. *Gaywood Mfg. Co.,* 299 NLRB 697 (1990).

Veres testified that he called RKegel and said that "I'd like to see if I could come back to work, if I could talk to him." He further elaborated that at the meeting "we said that we'd like to come back to work, if, I mean, if our jobs are still available." His testimony is not corroborated by the notes taken by Barbara Welsh, which were introduced by the General Counsel (GC Exh. 9). The notes do not mention that Veres or Winchell stated that they wanted to return to work or anything close to it. Instead, the notes confirm that Veres asked if their jobs were still available, which no one disputes, and then the discussion shifted to the other striking employees who Winchell sought to entice to return to work depending upon the results of the meeting.

Veres' testimony is also contradicted by Welsh's notes, which disclose that Veres asked what would happen to the libel lawsuit, if they returned to work. Both he and Winchell denied that the libel lawsuit ever came up at the meeting.

Winchell's credibility was undermined at the hearing when he denied at least twice that some of the employees that he spoke to about returning to work expressed an interest in returning. He was contradicted by Veres, who testified that Winchell told the Kegels at the meeting that there were other striking employees that he had spoken to who also wanted to come back. His testimony was inconsistent with his earlier affidavit, which said that he called some other people to see if they were interested in ending the strike and there was some interest. Finally, Winchell contradicted himself when he testified that he did tell the Kegels that there were other employees who had some interest in returning to work although there was some concern about Don Viccari.[59]

Rather than establishing that Veres and Winchell made an unconditional offer to return to work, the evidence paints a picture of two individuals who, after being on strike for 8 months, were trying to sound out their employer as to what would happen if they and some others returned to work. The continual reference to the other employees who had some interest in returning to work, but were apprehensive about Don Viccari, and the reference to the libel lawsuit, if anything made the Kegels apprehensive themselves. To the extent that there may have been some confusion, RKegel attempted to address the issue when he told Veres, a few days after the meeting, that "a determination would be made on individual basis when an unconditional offer to return to work is made." Despite Veres' testimony that he did not understand what RKegel meant and that RKegel declined to elaborate, I do not find anything cryptic about the sentence, which supports a reasonable inference that an unconditional offer had not been made and that the Respondent would consider such an offer if and when it was made.

I find that an unconditional offer was not made by Veres and Winchell and therefore the Respondent did not unlawfully refuse to reinstate them. Accordingly, I shall recommend that the allegations in the second amended complaint be dismissed.

4. The Union's failure to make an unconditional offer to return to work on March 14

Notwithstanding what anyone else at the bargaining table may have thought they heard on March 14,[60] the testimony of the Union's chief negotiator, William McGrath, establishes that while he "intended" to make an unconditional offer to return, he never actually did. After studying the March 5 letter, McGrath had questions, and serious doubts, about whether all of the jobs were still available. He went into the meeting hoping to ascertain whether the striking employees would be brought back at a higher wage and which of the temporary replacements were performing what jobs. When the meeting opened, McGrath said he was going to make an unconditional offer, but first he wanted to obtain information, which he believed was necessary in order to make the actual offer to return.[61] As McGrath explained,

> If the day had proceeded as I had hoped, I expected that at some point, there would be a discussion about a return to work which would be orderly and take into consideration it was a newspaper and its special arrangements to get a paper out every day. I was willing to enter into a return-to-work agreement. I was willing to suggest at that point in time, " Why don't we sign the whole thing and just say the same rate of pay to the workers coming back as replacements and make a contract? (Tr. 786.)

The day, however, never progressed as McGrath had hoped and more importantly it never progressed to the point of making an unconditional offer to return to work. As McGrath testified, his plan was short-circuited when the Respondent returned from the caucus and handed him the March 13 letter. Asked whether there was a particular set of answers that he needed in order to send people back to work? McGrath said, "I didn't have to have any answers. I could just say, 'I make an unconditional offer,' and took potluck. But, then I would have had to done the same process after the fact, and I would have had everybody on my back." Thus, the evidence establishes, and I find, that an unconditional offer to return to work was not made on March 14.

Instead, the evidence shows, and I find, that the Union's first unconditional offer to return to work was made on May 15, 1996. On that date, Campbell wrote to Smith seeking to "reconfirm" that "each of the employees is making an unconditional offer to return to work, at all times since March 14, 1996." The letter alludes to the fact that the Union attempted to make this point clear at each of the last two bargaining sessions (March 14 and May 13), but there is no evidence to corroborate this self-serving statement,[62] which was quickly refuted by Smith in a reply letter, dated May 21.

[59] In contrast, I find that the evidence, including Barbara Welsh's notes, substantiate the Kegels' account of what occurred.

[60] Caputo, MacDonald, and Campbell all testified that McGrath made an unconditional offer to return to work on March 14.

[61] In a prehearing affidavit, McGrath stated that he "intended" to make an unconditional offer to return to work, but had not done so, at least at the outset of the March 14 meeting, when Smith asked if he was going to.

[62] To the contrary, in a letter to Smith, dated March 26, Campbell tacitly concedes that such an offer was not made, when he explained that at the March 14 bargaining session the Union requested informa-

In accordance with the above, I shall recommend that the allegations in the second amended complaint, as amended, that the Union made an unconditional offer to return to work on March 14, and that the Respondent failed to reinstate the strikers prior to May 15, be dismissed.

5. The unlawful discharge of the strikers

A false statement by an employer that permanent replacements have been obtained, in effect, terminates the striking employees in violation of Section 8(a)(3) and (1) of the Act. *American Linen Supply Co.,* 297 NLRB 137 (1989), enfd. on other grounds 945 F.2d 1428 (8th Cir. 1991). The replacements must be permanent at the time of discharge and the burden of proving that the replacements were permanent employees lies with the employer, who must show that there was a "mutual understanding" with the replacements that they were permanent. *NLRB v. Mars Sales & Equipment Co.,* 626 F.2d 567 (7th Cir. 1980); and *NLRB v. Augusta Bakery Corp.,* 957 F.2d 1467, 1473 (7th Cir. 1992). See also, *Georgia Highway Express,* 165 NLRB 514, 516 (1967), affd. sub nom. *Teamsters Local 728 v. NLRB,* 403 F.2d 921 (DC Cir. 1968), cert. denied 393 U.S. 935 (1968).

The facts relating to this issue are not disputed. At the outset of the March 14 meeting, and up to the lunchtime caucus, Smith on behalf of the Respondent steadfastly maintained that the jobs of all of the striking employees were available and that the replacements were temporary. After attending a 2-hour caucus with Ryan Kegel, Smith returned to the meeting and handed McGrath a letter, dated March 13, which stated that as of that day, the replacements were considered to be permanent regular employees. The Respondent has not produced any evidence whatsoever showing that on or before March 14, it had advised the replacements, or any one of them, that they were considered to be permanent, that they perceived themselves as permanent replacements, or that there was an understanding (mutual or otherwise) between the Respondent and the replacements that they were permanent. Rather, the undisputed evidence establishes that the Kegels did not advise the replacements that they were permanent until the following day, March 15, in a meeting during which several replacements had questions about what that actually meant.

I therefore find that the Respondent falsely stated that the replacements were permanent, thereby terminating the strikers.[63] Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act.[64] In addition, I find that by doing so, the Respondent prolonged the strike. The evidence establishes that, although McGrath had not yet made an unconditional offer to return to work, it was his desire and expectation to do so sometime in the afternoon of March 14, after returning from the lunchtime caucus. The Respondent's action thwarted that attempt, and prolonged the strike, as well as the negotiations. Finally, the evidence establishes, and I find, that the Union first made an unconditional offer to return to work on May 15, 1996. Accordingly, I find that by failing to reinstate the strikers on their unconditional offer to return to work on May 15, 1996, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. The alleged refusal to provide information

The General Counsel argues that the Respondent violated the Act by failing to furnish the Union with information relevant to making an unconditional offer to return to work, i.e., the number of bargaining unit positions which existed at the Ledger and the Valley Tribune as of March 14, 1996, and the status of the positions formerly occupied by the striking employees. I do not agree. The information requested by the Union was not relevant because Smith had told the Union in writing and in person that all of the jobs of the striking employees were available should they make an unconditional offer to return to work. No probative evidence has been presented showing that his statements were not accurate, at least up until the lunchtime caucus, or that the Respondent was not ready, willing, and able to return all of the striking employees to their former positions, had the Union made an unconditional offer to return to work on March 14. To this extent, the information sought was not relevant.

Nor was the information, which McGrath demanded, necessary to make an unconditional offer because the Respondent had already provided the Union with sufficient information which would have enabled it to make such an offer. Prior to March 14, and more specifically by letter dated, January 16, 1996, the Respondent, through its representative Smith, gave the Union a list of all replacements, showing their names, addresses, wages, and the positions that they had filled. It subsequently provided a list of regular employees who either continued to work or returned to work, containing the same information as the replacement list. On January 31, Smith provided the Union with an updated replacement list, as well as a list of replacements who had resigned or had been terminated prior to January 16, when the first replacement list was compiled.

I find that by March 14 the Union had been provided with sufficient information to discern who the replacements were, how much they were being paid, what jobs they were performing, and, in addition, it had been assured in writing that none of the bargaining unit positions had been reduced or eliminated and that all of the striking employees' jobs would be available. Accordingly, I find that the requested information was not necessary to facilitate an unconditional offer to return to work. Finally, and contrary to the General Counsel's assertions, I find that the additional information, provided to that Union on March 20, 1996, which essentially "married" the two lists as McGrath requested, was not incomprehensible, but was a reasonable attempt to do what McGrath had requested. That information, in addition to the lists provided to the Union in January, was also sufficient to allow the Union to make an unconditional offer.

Accordingly, I shall recommend that the allegations concerning the Respondent's failure to provide relevant information be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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tion about existing positions in order to "advise the employees who were prepared to make unconditional offers to return to work."

[63] By order, dated January 13, 1997, the Federal district court granted an injunction pursuant to Sec. 10 (j) of the Act directing the Respondent to offer interim reinstatement, among other things, to the striking employees. *Gerald Kobell, Regional Director v. Citizens Publishing & Printing Co.,* Case No. 96-2366 (USDC-W.D.Pa.).

[64] Although I have made a finding that the strike which began on July 24, 1995, was an unfair labor practice strike, this additional unfair labor practice, which I find prolonged the strike, would have nevertheless converted the strike to a ULP strike, had I ruled otherwise.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time employees, including Editor, Valley Tribune; Classified Supervisor and Sports Editor employed by the Employer at its Ellwood City and Beaver Falls, Pennsylvania, facilities; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

4. Since December 30, 1993, the Union has been the exclusive representative for purposes of collective bargaining of the employees in the above-described appropriate unit within the meaning of Section 9(a) of the Act.

5. By unilaterally subcontracting the bargaining unit work of the regular full-time photographer to photographic stringers, when the parties were not at impasse in negotiations and when no extenuating circumstances existed, the Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

6. By falsely advising the Union that the replacements were permanent replacements, the Respondent unlawfully terminated the employment of the striking employees in violation of Section 8(a)(3) and (1) of the Act.

7. By failing to reinstate the discharged strikers on their unconditional offer to return to work on May 15, 1996, the Respondent engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. With respect to the allegations concerning the Respondent's precomplaint conduct in filing the state court lawsuit in *W. Ryan Kegel & Scott Kegel v. The Ellwood City Press,* Court of Common Pleas, Lawrence County, Pennsylvania, Case No. 10046 of 1996, the Board's proceedings are stayed pending the final outcome of that case. If the plaintiffs prevail in state court, i.e., if the state court finds merit in the allegations that the statement by L. David Brown and the publication thereof, was defamatory and malicious (as defined by the Federal law standard or in a manner that is consistent therewith) or if the matter is settled, then the allegations herein will be deemed dismissed. If the state court finds against the plaintiffs or in favor of all or any one of the defendants or if the lawsuit is withdrawn or otherwise shown to be without merit, then under those circumstances this case will proceed, and I hereby retain jurisdiction, to determine whether the lawsuit was motivated by retaliatory purposes.[65]

10. Except as found above, the Respondent has not violated the Act as alleged in the complaint.

[65] In light of my findings and conclusions, it would be appropriate for the General Counsel, Charging Party, and anyone acting for or in concert with them, to file a motion in Federal district court to lift the stay of the state court lawsuits.

REMEDY

Having found that the Respondent, Citizens Publishing & Printing Company, has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully failed to bargain with the Union over the subject of subcontracting the night and weekend photo work performed by the regular full-time photographer, when no impasse in negotiations had occurred and when no exigent circumstances existed, it shall be ordered to meet and bargain in good faith with the Union concerning the use of photographic stringers to perform the above-reference night and weekend work of the regular full-time photographer. I shall not order, however, a make whole remedy for the full-time photographer because the essence of the violation is the failure to bargain itself and in light of my finding that the acting full-time photographer at the time of the violation did not sustain a loss of earnings as a result thereof.

The Respondent having unlawfully terminated the striking employees by falsely advising the Union that the replacements were permanent, it shall be ordered to offer those employees who were on strike on May 15, 1996, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employee hired since the date of the strike, July 24, 1995, to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of Respondent Citizens Publishing & Printing Company's unlawful acts herein detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of the Union's unconditional offer to return to work, May 15, 1996, to present less their net interim earnings during such periods, with interest thereon, to be computed on a quarterly basis in the manner established in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizon for the Retarded,* 283 NLRB 1173 (1987).

It shall be further ordered that the Union be allowed no attorney fees for the defense of the state court lawsuit at this time; however, jurisdiction shall be retained for the purpose of assessing such attorney fees or further action in the event the Respondents, Citizen Publishing & Printing Company, W. Ryan Kegel and Scott R. Kegel, do not prevail on the remainder of the state court action.[66]

[Recommended Order omitted from publicartion.]

[66] See *Buffalo Newspaper Guild Local 26 (Buffalo Courier Express),* 266 NLRB 813 (1983).